LIBRARY
SUPREME COURT, U. S.

FILED
SEP 24 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-227

CONTINENTAL BAKING COMPANY, *Petitioner*,

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

JOHN H. SCHAFER
888 - 16th Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Of Counsel:

E. EDWARD BRUCE
COVINGTON & BURLING
888 - 16th Street, N.W.
Washington, D.C. 20006

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-227

CONTINENTAL BAKING COMPANY, *Petitioner*,

v.

THE OLD HOMESTEAD BREAD COMPANY and INTERSTATE BRANDS CORPORATION, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITIONER'S REPLY BRIEF

A few comments are required in response to the briefs filed by respondents in opposition to Continental Baking Company's petition for certiorari.

I. RESPONDENTS HAVE ATTEMPTED TO INTRODUCE EXTRANEOUS ISSUES TO OBSCURE THE NATURE OF THE RULING BELOW.

Respondents in their briefs and oppositions take a tack typical of parties attempting to preserve lower court judgments from this Court's scrutiny. They ignore the function of intermediate appellate courts, whose task is to refine and narrow issues, and seek to introduce a variety of contentions and issues not ruled upon by the Court of Appeals in order to obscure the nature of the rulings which that court did make. Thus, despite the fact that the Court of Appeals affirmed the trial court's judgments solely on the basis of the Robinson-Patman Act,[1] respondents introduce a host of arguments that have nothing to do with that statute, but instead concern only matters relevant to Sherman Act claims, such as the attack upon shelf-space allocation under the Tender Crust program, the alleged retail price maintenance by Continental, and the fixed relationship of prices between Tender Crust and Continental's advertised label product.

Continental met and refuted each of these arguments in dealing with Old Homestead's Sherman Act arguments below, and at the very least it can be said that

---

[1] Old Homestead claims that the Court of Appeals affirmed the trial court's judgments on Sherman Act theories, as well as the Robinson-Patman Act. (OH Br. 1-2, 19-20) This claim is frivolous. The court below expressly stated:

> "In this opinion we give consideration only to the Robinson-Patman aspect of this litigation." (Petn. App. 6a.)

The court's use of the term "verdicts" in the concluding language of its opinion refers, of course, to the two verdicts in favor of Old Homestead and Interstate on their Robinson-Patman claims.

the Court of Appeals did not indicate any agreement with those Sherman Act contentions. Of course, if the Court grants certiorari and agrees with Continental's view of the Robinson-Patman Act, Old Homestead would have a full opportunity on remand to once again attempt to convince the Tenth Circuit to affirm the Sherman Act judgments. But in the meantime, this Court should not let respondents' obscurant tactics succeed in deflecting its attention from the significant Robinson-Patman issues decided below.

II. THERE IS A SQUARE CONFLICT BETWEEN THE DECISION BELOW AND THE FIFTH CIRCUIT'S BORDEN DECISION.

Paralleling their efforts to introduce irrelevant Sherman Act considerations in this Court, respondents attempt to distinguish the Fifth Circuit's analysis of the Robinson-Patman Act in *Borden Co.* v. *FTC,* 381 F.2d 175 (1967), by recourse to extraneous contentions that are both legally irrelevant and factually unsupported.

The issue at this stage in the litigation under the Robinson-Patman Act is simple and clear cut: Can a Robinson-Patman Act judgment be predicated upon a mere difference in price between private and advertised label goods without any showing that lower prices on private label were subsidized or otherwise made possible by higher prices on advertised products? The Fifth Circuit squarely held that a mere price difference on private label which was unsupported by higher advertised label prices is not condemned by the Robinson-Patman Act. The Tenth Circuit, in affirming a verdict which was based upon a record that conclusively demonstrated the lack of any connection between pri-

vate label prices and higher advertised label prices, has plainly held to the contrary. Thus, there is a division between the circuits on an issue of great significance under the antitrust laws.[2]

Significantly, neither respondent attempts to refute Continental's showing that there was no evidence in the record in this case that its Tender Crust prices were supported by its higher Wonder prices. Instead, both allege that Continental was guilty of predatory conduct and that primary line competition in the wholesale baking industry was injured by the Tender Crust program.

As respondents own briefs demonstrate, proof of predatory intent in a Robinson-Patman Act case pertains only to a showing that there was probable injury to competition, one of the elements required by the statute to sustain liability. (OH Br. 10; IBC Br. 11) The aspect of the *Borden* case relied upon by Continental does not in any measure turn upon the absence of predation or injury to competition. It instead pertains to "the absence of the necessary causal relationship between the difference in prices and the alleged competitive injury." 381 F.2d at 180. For after deter-

---

[2] Respondents' briefs highlight a further conflict on a related issue justifying certiorari in this case. Old Homestead relies upon Lloyd A. Fry Roofing Co. v. FTC, 371 F.2d 277 (7th Cir. 1966), for the proposition that in area price discrimination cases it is not necessary to find that lower prices in one market are supported by higher prices in another. (OH Br. pp. 10-11) Continental noted this decision, but also cited a directly conflicting Ninth Circuit opinion, Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (1955), *cert. denied*, 350 U.S. 991 (1956). (Petn. pp. 12-13) The Court could resolve the conflict between the circuits on that issue in the course of resolving the conflict presented by the decision below.

minimis that the FTC had not shown Borden's private label prices were supported by its higher advertised label prices, the Fifth Circuit concluded that

> "[I]njury proven in the primary line, if any, is not *the effect* of the price differences in issue." *Ibid.* (Emphasis in original).

Thus, respondents' claims concerning Continental's alleged predatory behavior and the alleged injury to competition resulting from the Tender Crust program do not avoid the conflict between the ruling below and the Fifth Circuit's *Borden* opinion.

Moreover, on the facts, the claims as to predatory behavior are without support. Continental did not sell below cost except, as the Court of Appeals found, "during a very short period" (Petn. App. 9a) at the very end of 1967 when market prices were driven unusually low by Rainbo's aggressive pricing. (JA 1649, X 113-115). The fact that Continental built a plant which anticipated growth is clearly not inconsistent with the trial court's own observation that there was no evidence of predatory conduct. (JA 2294.) And, finally, a price increase announced two weeks before it was known that Old Homestead was going out of business simply is not evidence of a design to eliminate Old Homestead. If anything, it shows an effort on Continental's part to restore profitable prices. (JA 919-20, 994.)

Finally, Old Homestead appears to try to avoid the impact of the *Borden* analysis by arguing that the private label price was contractually tied to the advertised label price so that Old Homestead was, indeed, injured by the difference in prices. Since all private label merchandise must be sold by manufacturers for

less than advertised label goods, this is just another way of arguing that the *Borden* analysis should be rejected. If respondents were injured at all by Tender Crust, it was not because of any dependence of Tender Crust prices on Wonder prices, but because of the independently determined lower Tender Crust prices. And as the *Borden* case made clear, the Robinson Patman Act does not proscribe low prices.

III. CONTINENTAL WAS DENIED THE OPPORTUNITY TO HAVE THE JURY CONSIDER ITS AVAILABILITY DEFENSE.

In their continuing efforts to confuse the issues decided below, respondents interject a variety of irrelevant and immaterial considerations in response to the arguments in Continental's petition concerning the availability defense. Thus, they argue that a discount on one of its private label brands deprived Continental of that defense. But as respondents own briefs show, the jury was not even permitted to consider the availability of other Continental private label products as a defense to the alleged discrimination involved in the Tender Crust program. (Oll Br. 18; Hbc Br. 14) It was instead instructed that there would be no violation only if the Tender Crust label itself was "offered indiscriminately to everybody . . . ." (JA 2659) The jury was, thus, not allowed to consider Continental's explanation for any differences in price between its various private labels.[8] Its proof that discounts under the Tender Crust program were offered

[8] By and large, Continental offered private label bread to all of its customers under the same terms and conditions. It was only on two occasions that Continental had to grant special discounts to Tender Crust purchasers to meet the lower prices offered by Rainbo. (X 864, 886)

solely to meet the competition of other wholesale bakers (principally Rainbo) was treated as legally irrelevant.

Accordingly, this case squarely presents the issue as to whether the availability of private label bread to all customers in the market stands as a defense to an attack upon a particular private label program.

IV. THE DECISION BELOW, IF UNCORRECTED, WILL VITIATE PRIVATE LABEL MERCHANDISING TO SMALL RETAILERS.

As we have demonstrated above, the Tenth Circuit's disregard of the Fifth Circuit's rule in the *Borden* case and its refusal to require even an instruction on the availability defense cannot be distinguished away by any alleged peculiarities or unique aspects of the Tender Crust program. The rule that emerges from the Tenth Circuit's opinion is that any private label price that is below an advertised price, even if it stands on its own bottom and even if other private label is available to all other customers in the market, will justify sending a Robinson-Patman Act case to a jury, so long as the plaintiff can introduce some minimal evidence concerning probable injury to competition, such as increased sales by the defendant, etc. Under these circumstances no manufacturer can reasonably be expected to take the risk of selling private label products to independent retailers that will allow them to compete with their vertically integrated chain store competitors.

The result sanctioned below is distinctly at odds with the basic purpose of the Robinson-Patman Act, which was to allow more effective competition between small retailers and large chains. The rule of law relied upon

by the court below should not therefore be allowed to stand unless this Court is convinced that it is required by the Robinson-Patman Act. Since the only other court of appeals that has squarely confronted this issue has held that it is not, the Court should give this matter its most complete and considered attention.

The writ should be granted.

Respectfully submitted,

JOHN H. SCHAFER
888 - 16th Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Of Counsel:

E. EDWARD BRUCE
COVINGTON & BURLING
888 - 16th Street, N.W.
Washington, D.C. 20006

Dated: September 24, 1973

